Supreme Court, U.S.
FILED
JUL - 8 1994
OFFICE OF THE CLERK

NO. 94-60

(1)

IN THE

Supreme Court of the United States

October Term, 1994

IN RE ANTWAN BYRD,

Petitioner,

- against -

PRESENTMENT AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF SUPREME COURT OF THE STATE OF NEW YORK: SECOND JUDICIAL DEPARTMENT

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30 pp

QUESTIONS PRESENTED

1. In a Juvenile Delinquency proceeding, is the accused entitled to an impartial tribunal guaranteed by the Sixth Amendment?

2. In a Juvenile Delinquency proceeding, may a judge excluding a person pursuant to statute exercise his discretion upon the basis of the person's religious preference?

LIST OF PARTIES

The parties are listed in the caption. The presentment agency is represented by the County Attorney for Westchester County, New York.

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Point I

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NO.

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October Term, 1994

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IN RE ANTWAN BYRD,

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- against -

PRESENTMENT AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF SUPREME COURT OF THE STATE OF NEW YORK: SECOND JUDICIAL DEPARTMENT

PRELIMINARY STATEMENT

Petitioner, Antwan Byrd, respectfully requests that a Writ of Certiorari be issued to review a decision and order of the Supreme Court of the State of New York, Appellate Division: Second Judicial Department entered in the above captioned proceeding on November 15, 1993. Leave to appeal to the Court of Appeals of New York was denied on May 3, 1994.

OPINION BELOW

There was no opinion in the State of New York,

Court of Appeals (Kaye, Ch. J.). The State of New York, Court of Appeals denied petitioner's motion for leave to appeal. This decision reprinted in the Appendix at pages 1a and 1b.

The Appellate Division's opinion is presented in the Appendix at pages 3a and 4a.

JURISDICTION & TIMELINESS

This Court has jurisdiction to review the decision and order of the State of New York, Appellate Division: Second Judicial Department pursuant to 28 U.S.C. Section 1254(1).

This petition is timely because filed within 90 days of the Court of Appeal's decision, Supreme Court Rule 13.1.

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

United States' Consitiution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

United States' Constitution, Amendment V:

> "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

United States' Constitution, Amendment VI:

> "In all criminal prosecutions, the

> accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..."

United States Consitutitional, Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Family Court Act Section 341.1:

> "The General public may be excluded from any proceeding under this article ..."

STATEMENT OF THE CASE

Petitioner was charged with acts, if committed by an adult, would constitute the crimes of Sodomy in the FIrst Degree, (2 Counts) and Sexual Abuse in the First Degree, (4 Counts). After a Fact Finding Hearing before Honorable

J. Emmitt Murphy of the Family Court, Westchester County, petitioner was adjudicated a juvenile delinquent for having committed acts if committed by an adult would constitute Sodomy in the First Degree, Class B Felonies (2 Counts) and Sexual Abuse in the First Degree, Class B Felonies (2 Counts). By order of the Family Court entered December 17, 1992, he was placed with the Division for Youth for a period of 3 years in restrictive placement.

During the Fact Finding Hearing the Family Court Judge opined that he was not the Good Lord and Opined that it would be much easier for petitioner to admit guilt and get a program rather than going to trial. In addition, the Court vowed that "I wouldn't want (petitioner) going to school with my kids." At the Dispositional Hearing, the Family Court Judge chided the defense counsel over petitioner's religious preference, referred to petitioner's grandmother as a prophet and chuckled that prophets have pretty direct contact.

The following two colloquies took place during the Fact Finding Hearing:

> **THE COURT:** "Okay. For our purposes, I received about a jillion letters. They all seem to mention your mom in one form or another. She seems to be a wonderful person, who has got an awful lot of friends and contacts, and that's all to the good.
>
> I have also been saying that there isn't any doubt in my mind--any doubt at all in my mind, that Antwan needs help. And I would like to see Antwan get some help.
>
> He may find it very difficult--assume with me for just one moment--that he had done sexually abhorrent behavior,

had done something like that, you know, and I think he may have had a hard time admitting it publicly, or to anybody who might relay that admission to your mother.

I think she is a very strong person, and a very strong influence on Antwan.

I'm not the Good Lord. There is always a possibility that I'm wrong. I feel confident that in this case I am not wrong. And if I'm not wrong, it would be good for him if he could admit it.

But, I can understand how difficult it can be for him to admit it, if he thought the admission was going to get back to her.

Do you understand what I'm saying?"

SHARON BYRD: "I understand what you're saying." (FFH4-5)

* * * * * * * * *

MR. SCOTT: "On the last court appearance the Court asked us, the attorneys, for some decision as to whether or not this matter could or could not be worked out?

THE COURT: Right.

MR. SCOTT: During that discussion the Court indicated, I think, I don't know the exact words, but I remember something being said to the effect that "I wouldn't want him going to school

with my kids." Now that, to me, indicates that the Court has already made up its mind about whether Antwan is innocent or guilty of these charges. So I don't know if Antwan is being judged by someone who is not being biased against him because a statement like that indicates there is some biases against him as a result of just the charges, that this was a fact-finding hearing.

We had not heard one bit of evidence at the fact-finding hearing when that statement was made, and I interpret that as a statement of bias against my client.

THE COURT: Is that what you just wanted to say on the record?

MR. SCOTT: What I wanted my client to have was a hearing with a fair and impartial listener. But that statement indicated some bias against him.

THE COURT: Okay. That statement if you think back now and put it into perspective -- I know you won't deliberately misstate the case, but you said we hadn't had any testimony. That isn't so at all.

MR. SCOTT: I said we didn't have testimony at a fact-finding hearing.

THE COURT: Right. But I had.

> **MR. SCOTT:** At a probable cause, but that is not the fact-finding, Judge." (FFH 121-122).

Furthermore, the following colloquy took place during the Dispositional Hearing:

> **MR. SCOTT:** The only request that I have, Judge, is my client's grandmother asked if she could be present?
>
> **THE COURT:** It is okay by me. I wonder, she is a pretty strong influence on his life.
>
> **MR. SCOTT:** It is easier for her to hear what is going on, then for me to try and explain afterwards.
>
> **THE COURT:** She is also a kind a *repressive influence*. If you look at the report.
> **MR. SCOTT:** It is just a request.
>
> **THE COURT:** I don't know how good it is for you to be her -- needless to say the mom --
>
> **MR. SCOTT:** I don't think the mom understands a lot of what is going on.
>
> **THE COURT:** Well, she understood enough about Antwan that she saw problems. I don't know if grandma could see any problems. She was here

> the last time and she *described herself as a prophet.* I don't know if I could insert myself into that.
>
> **MR. SCOTT:** I wasn't here when that took place.
>
> **THE COURT:** *Prophets have pretty direct contact.*
>
> **MR. SCHENDERMAN:** Your Honor, I would object to Pastor Byrd being present. She was present for the initial stages, I believe it was the probable cause hearing, and possibly the initial stages of the trial. (DH 4-5).

On appeal, petitioner contended that the Court deprived him of a fair trial. The Supreme Court of the State of New York, Appellate Division: Second Judicial Department rejected that contention finding that such contention was without merit.

REASONS FOR GRANTING THE WRIT

POINT ONE

THE DECISION AND ORDER OF THE STATE OF NEW YORK, APPELLATE DIVISION: SECOND DEPARTMENT REJECTING PETITIONER'S CLAIM THAT HE WAS DEPRIVED OF A FAIR TRIAL, IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND CONSTITUTES AN UNACCEPTABLE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In the instant case at bar, petitioner respectfully submits to this court that he was deprived of his First, Fifth, Sixth and Fourteenth Amendment Consitutional rights to a fair trial. Petitioner urges this court that the decision and order of the Appellate Division: Second Judicial Department which found petitioner's claim to be without merit is in direct conflict with prior decisions of this court and constitutes an unacceptable departure from the acceptable departure from the accepted and usual course of judicial proceedings. The failure to accord an accused of a fair hearing violates even the minimal standards of due process. *Turner v. State of Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549, 13 LEd. 2d 424. In the setting of an adult criminal trial, a fair trial in a fair tribunal the basic requirement of due process is defined as one in which the verdict is based solely upon the evidence developed at the trial and by an "impartial tribunal". *Shepperd v. Maxwell*, 384 U.S. 333 at 361, 86 S. Ct. 1507, 16 LEd. 2d 600 (1966).

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness * * * [T]o perform its high function in the best way justice must satisfy the appearances of justice."

Estes v. State of Texas, 381 U.S. 532, 540-541, 85 S. CT. 1628, 14 LEd. 2d 543.

Turning to the case at bar, Family Court judge deviated from the standard when he blatantly directed discriminatory and prejudicial remarks towards petitioner and petitioner's family members, particularly in the form of

obvious religious references. The record clearly demonstrates remarks, suggesting that it would be easier for the accused to plead guilty and obtain a program, which would not be tolerated in an adult criminal court. The question presented is whether or not the Constitution requires the same impartiality in a juvenile delinquency proceeding.

While in adult criminal trials the accused is entitled to "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power", *Sheppard v. Maxwell,* 384 U.S. 333 at 350, 86 S. Ct. 1507 16 LEd. 2d 600 (1966) and "neutral and detached judge in the first instance." *Concrete Pipe and Products v. Construction Laborers Pension Trust for Southern California,* ___ U.S. ___, 113 S. Ct. 2264 at 2277, ___LEd.___ (1993), the rights afforded juveniles in delinquency proceedings have only been selectively absorbed the Bill of Rights. *In Re Gault* (387 US 1, 87 S. Ct. 1428, 18 LEd. 2d 52 [1966] established the right to counsel, confrontation, cross-examination, a verbatim record and appeal. *In Re Winship*, 397 US 358, 90 S. Ct. 1068, 25 LEd. 2d 364 [1970]) engrafted the reasonable doubt rule onto juvenile proceedings. However in *McKeiver v. Pennsylvania,* (403 US 528, 91 SCt. 1976, 29 LEd 2d 647 [1972]), the Court refused to extend either the jury or the public trial requirements of the constitution. There is no case that specifically holds a juvenile is entitled to impartial tribunal. Indeed juvenile proceeding'[s] are different from an adult criminal trial. [Notwithstanding] the informality and flexibility that characterizes juvenile proceedings ...such proceedings [must] comport with the fundamental fairness demanded by the Due Process Clause." *Schall v. Martin,* 467 U.S. 253, 104 S. Ct. 2403, 2409, 81 LEd. 2d 207, 263 (1984).

To some extent an impartial tribunal might be inconsistent with the lingering paternalism or protectionism

which overshadows much of the secrecy of the Family Court process. In that mind frame, a judge should be active and involved and ready to correct error and provide guidance for the benefit of the youngster, and be deaf to considerations offered in defense which would countermand the corrective purpose of a disciplinary proceeding.

Yet the predominate view cast by the Gault decision is that proceedings must be based upon legalistic regularity. "Juvenile court history has demonstrated that unbridled discretion is frequently a poor substitution for principle and procedure .... Due Process delimits the powers [of] the state ... Procedure is to law what the scientific method is to science. *In Re Gault,* 387 U.S. 1, 20-21, 87 S. Ct. 1428, 1439-1440, 18 LEd. 2d 52 (1966). Even to credit the Family Court with a measure of discretion does not render it a law unto itself. "Latitude ... assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness." *Kent v. United States,* 383 U.S. 541, 554, 86 S. Ct. 1046, 1053, 16 LEd .2d 84 (1966).

"The applicable due process standard in juvenile proceedings ... is fundamental fairness [in] fact finding procedures" *In Re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 LEd. 2d 364. "Neither man nor child can be ... condemned by methods which flaunt constitutional requirements of due process of law." *McKeiver v. Pennsylvania,* 403 U.S. 528 at 543, 91 S. Ct. 1976, 1979, at 1985, 29 LEd. 2d 647; quoting *Haly v. Ohio,* 332 U.S. 596, 68 S. Ct. 302, 92 LEd. 224 (1948).

Typical of power run amok were the religious referencs made when the court denied the grandmother's application to be present. Under the New York Family Court Act, a judge has been afforded that power. The manner in which it was denied established a religious test for entrance which is firmly prohibited by "[t]he liberty

guaranteed ... [to the] freedom ... a[nd] the right of the individual...[to] bring up children [and] to worship God according to the dictates of conscience" ...*Meyer v. Nebraska,* 262 U.S. 390, 396, 43 S. Ct. 625, 626, 67 LEd. 2d 1042 [1923]; *Wisconsin v, Yoder,* 406 U.S. 205 at 213, 214, 92 S. Ct. 1526, 22 LEd. 2d 15 (1972).

The Judge might find fault with the reference to the Grandmother as a "prophet", a title of respect used in some Evangelical Denominations, but Religious beliefs "need not be acceptable, logical, consistent or comprehensible" to warrant protection. *Church of Kukumi Babalu Aye v. City of Itiabah,* ___U.S.___, 113 S. Ct. 2217, 2225, 24 LEd. 2d 472 (1993).

CONCLUSION

Acceptance of this case would provide the court with the opportunity to determine whether an accused in a juvenile delinquency proceeding has the right to an impartial tribunal guaranteed by the Sixth Amendment. Acceptance of the case would provide the court with the opportunity to fill a gap in the law left by *GAULT* and *WINFIELD* and to conform juvenile proceedings to adult standards of impartiality. It would also provide the court with the opportunity to determine whether discretionary dcisions in a court may be made in whole or in part on antipathy toward the religion of the persons involved.

Respectfully submitted,

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(516) 588-6244
Counsel of Record

APPENDIX A

State of New York, Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of May 1994

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

2-10 Mo. No. 178
In the Matter of Antwan B.
(Anonymous,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

APPENDIX B

State of New York
Court of Appeals

Donald M. Sheraw
Clerk's Office
Clerk of the Court
Albany, New York 12207

DECISION May 3, 1994

2-10 Mo. No. 178
Motion for leave to appeal denied.
In the Matter of Antwan B.
(Anonymous),
Appellant.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

0657q
C/hu
Argued - October 25, 1993

____Ad2d____

GUY JAMES MANGANO, P.J.
VINCENT R. BALLETTA, JR.
JOHN COPERTINO
DANIEL W. JOY, JJ.

93-00019

In the Matter of Antwan B. (Anonymous),
DECISION & ORDER
Appellant.

John F. Clennan, Ronkonkoma, N.Y., for appellant.

Marilyn J. Slatten, County Attorney, White Plains, N.Y. (Carol L. Van Scoyoc and Peter A. Carbone of counsel), for respondent.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the appeal is from an order of disposition of the Family Court, Westchester County (Murphy, J.), dated December 23, 1992, which, upon a fact-

finding order of the same court, dated December 17, 1992, made after a hearing, finding that the appellant had committed acts which, if committed by an adult, would have constituted the crimes of sodomy in the first degree (two counts) and sexual abuse in the first degree (two counts), adjudged him to be a juvenile delinquent, and placed him with the New York State Division for Youth for a period of three years. The appeal brings up for review the fact-finding order dated December 17, 1992.

ORDERED that the order of disposition is affirmed, without costs or disbursements.

It is well settled that a juvenile delinquency petition is facially sufficient if it contains nonhearsay allegations in either the factual part of the petition or the supporting depositions, which, if true, establish every element of the crimes charged and the appellant's commission thereof (*see,* Family Court Act § 311.2[3]). Contrary to the appellant's contention, we find that the victim's supporting deposition contained nonhearsay allegations of acts which, if committed by an adult, would have constituted ever element of the crimes of sodomy in the first degree and sexual abuse in the first degree (*see, Matter of Jahron S.*, 79 NY2d 632; *Matter of Alex B.*, 189 AD2d 813).

Viewing the evidence in the light most favorable to the presentment agency (*see, People v. Contes*, 60 NY2d 620, 621), we find that it was legally sufficient to establish the appellant's guilt of the acts charged beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the finding of guilt was not against the weight of the evidence (*see,* CPL 470.15[5]).

The appellant's remaining contentions are without merit.

MANGANO, P.J., BALLETTA, COPERTINO and JOY,

JJ., concur.

ENTER:

Martin H. Brownstein

Clerk

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

71090
Z/nl

GUY JAMES MANGANO, P.J.
VINCENT R. BALLETTA, JR.
JOHN COPERTINO
DANIEL W. JOY, JJ.

93-00019

In the Matter of Antwan B. (Anonymous),
DECISION & ORDER ON MOTION
Appellant.
(Dkt. Nos. E42, 45/92, FU 35234

Motion by the appellant for leave to appeal to the Court of Appeals from a decision and order of this court, dated November 15, 1993, which determined an appeal from a dispositional order of the Family Court, Westchester County, dated December 23, 1992.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., BALLETTA, COPERTINO and JOY, JJ., concur.

ENTER:

Martin H. Brownstein

Clerk

APPENDIX E

At a Term of the Family Court of the State of New York, held in and for the County of Westchester, at the Court house thereof, at 53 South Broadway, Yonkers, New York, on the 17th day of December, 1992.

P R E S E N T
Hon. J. Emmett Murphy
Judge

----------x

In the Matter of

ANTWAN BYRD,
ORDER OF DISPOSITION

A Person Alleged to be a
Docket No. E-42-92
Juvenile Delinquent,
X-10120-92

FU #35, 234
Respondent.

----------x

An Order of Fact-Finding having been entered in this Court on 12/18/92 (MURPHY, J.), adjudging that the Respondent herein committed the following acts: On or about August 3, 1992, at 73-83 Highland Avenue, Yonkers, New York, County of Westchester, he engaged in deviate sexual intercourse with another person by forcible compulsion, an act which, if committed by an adult, would constitute the crime of Sodomy in the first degree, as defined by Section 130.50(1) of the Penal Law, a Class B/Felony. Said act further constitutes a designated felony act, pursuant to Family Court Section 301.2(8); and, on or

about August 3, 1992, at 73-83 Highland Avenue, Yonkers, New York, County of Westchester, he engaged in sexual contact with another person by forcible compulsion, an act which, if committed by an adult, would constitute the crime of Sexual Abuse in the first degree, as defined by Section 130.65(1) of the Penal Law, a Class D/Felony; and, on or about August 4, 1992, at 73-83 Highland Avenue, Yonkers, New York, County of Westchester, he engaged in deviate sexual intercourse with another with another person by forcible compulsion, an act which, if committed by an adult, would constitute the crime of Sodomy in the first degree, as defined by Section 130.50(1) of the Penal Law, a Class B/Felony. Said act further constitutes a designated felony act, pursuant to Family Court Act § 301.2(8); and, on or about August 4, 1992, at 73-83 Highland Avenue, Yonkers, New York, County of Westchester, the above-named Respondent engaged in sexual contact with another person by forcible compulsion, an act which, if committed by an adult, would constitute the crime of Sexual Abuse in the first degree, as defined by Section 130.65(1) of the Penal Law, a Class D/Felony; and

The matter having thereafter duly come on for a dispositional hearing on December 17, 1992, before the Court; and the Presentment Agency having appeared by Marilyn J. Slaatten, Westchester County Attorney, Jodine L. Schenkerman, Assistant County Attorney, of counsel; and William Raftery, Westchester County Department of Probation, having appeared; and William Oberle, Division for Youth, having appeared; and Respondent having appeared personally and with his counsel, William Scott, Esq., Law Guardian; and Sharon Byrd, Respondent's mother, also having appeared; and

The Court, after having made an examination and inquiry into the facts and circumstances of this case and after making reports available to counsel in accordance with §351.1 of the Family Court Act, and having found that

Respondent requires supervision, treatment and confinement under Family Court §352.1, and having fully considered the matter of an appropriate disposition in accord with Section 353.5 of the Family Court Act, and having convened a special hearing and having considered the needs and best interests of Respondent, the record and background of Respondent, the nature and circumstances of the offense, including whether any injury was inflicted by Respondent, the need for the protection of the community, the age and physical condition of the victim, finds based upon a preponderance of the evidence and for reasons stated on the record, that the Respondent requires a restrictive placement, pursuant to Family Court Act §353.5(1); said finding is predicated, in
inter alia, upon the following facts or findings considered with respect to five factors enumerated in the Family Court Act §353.5(2):

(a) The needs and best interests of Respondent will best be served by restrictive placement. The Court finds that Respondent's family is not a viable resource to assist in his rehabilitation because they refuse to recognize the nature and seriousness of his deviate sexual disorder and that he committed acts which if done by an adult would constitute sodmy First Degree and therefore are unable to assist him in recovering;

(b) The Respondent's record and background indicate dichotomies in perceptions, feelings and actions, as evidenced by exceptionally large differentials between verbal and performance test scores. He is a deeply disturbed individual who, while showing no empathy for the victim, expressed to the Court extreme anxiety and remorse over his own incarceration;

(c) and (e) Upon examination into the nature and circumstances of the offense committed and the age and physical condition of the victim, the Court finds that without strict supervision and monitoring, the Respondent

would be highly likely to repeat the sexual offenses which he has been found to have committed. According to the psychiatric evaluation signed by Dr. Klaus Schreber and which was included as part of a Planning Conference Report prepared by the Westchester County Department of Probation and accepted into evidence by the Court during this dispositional hearing, Antwan is inappropriately preoccupied with sexual matters and viewed by his peers at Woodfield as predatory; and

(d) Considering the need for protection of the community, the Court finds that long-term treatment in a structured environment is necessary since the Respondent fails to recognize his problems,
having committed the offenses this Court finds him to have committed after a full and fair fact-finding hearing, and shows no empathy for the victim. Additionally, the Court finds that because of Respondent's unusually large stature and inability to control his impulses and desires, the need for protection of the community can only be accomplished by placing Respondent in restrictive placement;

NOW, therefore, upon the findings made in the fact-finding and dispositional hearings herein and upon all proceedings had herein; it is hereby

ADJUDGED, that the above-named Respondent is a juvenile delinquent on the ground that the Respondent, while under sixteen (16) years of age, committed acts which, if committed by an adult, would constitute the crimes of Sodomy in the first degree (two counts), as defined by Section 130.50(1) of the Penal Law, Class B/Felonies, which constitute designated felonies pursuant to Family Court Act §301.2(8); and Sexual Abuse in the first degree (2 counts), as defined by Section 130.65(1) of the Penal Law, Class D/Felonies; and on the further ground that Respondent requires restrictive placement pursuant to

Family Court Act §353.5; and it is therefore

ORDERED, that the Respondent be and hereby is placed with the New York State Division for Youth for a period of three (3) years in restrictive placement from 12/17.92 to 12/17/95, pursuant to Family Court Act §353.5(5)(a); placement for the first twelve (12) months to be in a secure facility with a recommendation that it be at the Harlem Valley with Respondent to receive credit for time spent at Woodfield Cottage secure detention facility from 7/26/92 to 12/17/92; placement for the following twelve (12) months to b at a residential facility to be determined by the New York State Division for Youth; and the remaining month of restrictive placement to be at the discretion of the Division for Youth; and it is further

ORDERED, that Respondent hereby is remanded to Woodfield Cottage pending transportation to a New York State Division for Youth restrictive placement facility.

Dated: December 23, 1992
Yonkers, New York

ENTER

12-23-92

_____

J.F.C.

_____

Chief Clerk of the Court

(2)

Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

No. 94-60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IN RE ANTWAN BYRD,

Petitioner,

vs.

PRESENTMENT AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK: SECOND JUDICIAL DEPARTMENT

BRIEF OF RESPONDENT COUNTY OF WESTCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether on the facts of this case, the New York State courts below properly determined that Petitioner received a fair and unbiased trial in a juvenile delinquency proceeding, and that Petitioner failed to produce any evidence indicating that the trial court was biased against him or his family based on their religious preference?

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CITATIONS OF OPINIONS BELOW

Respondent accepts the Petitioner's citation of the opinions below which are reproduced in the Appendix to the Petition for Certiorari.

STATEMENT OF THE CASE

During the summer of 1992, Joseph G., a diminutive eight (8) year old boy who lives in Long Island, New York, with his mother, went to visit his father Richard G., who was residing with his girlfriend, Sharon Byrd, in Yonkers, New York. Also residing with Ms. Byrd was her son, Antwan Byrd, Petitioner herein, a large (five-feet, ten inches tall and weighing 260 pounds) thirteen (13) year old boy.

Mr. G. brought his son to Yonkers on or about August 3, 1992, to visit. On the night, of August 3, 1992, Joseph G. was asleep on the couch in the living room of the apartment his father shares with Sharon Byrd, and her son, Antwan Byrd. Late that evening, when Joseph was sleeping (wearing only his T-shirt and underpants), Antwan entered the living room and repeatedly shook Joseph

until he awoke. When Joseph woke up, Antwan sodomized him, ignoring both Joseph's pleas to stop and his loud crying. After he ejaculated, Antwan ran back to his room, whereupon Richard G. and Sharon Byrd, entered the living room and found Joseph crying. Because he was afraid, Joseph said nothing about the incident.

Joseph stayed at his father's home for approximately three to four weeks that summer. As Joseph later told authorities, this abuse by Antwan Byrd occurred, in one form or another, repeatedly.

At the end of the summer when Joseph returned to his mother's home on Long Island, the above-described events of the past summer were eventually revealed to her. This occurred when Ms. G. asked Joseph what was wrong with him and

Joseph started crying and told her "Antwan was messing with me. The whole time." Joseph proceeded to tell his mother of the sexual abuse to which he had been subjected by Antwan during that past summer. Upon hearing Joseph's account of the events, Ms. G. called a Child Protective Services caseworker and eventually the Yonkers, New York Police Department.

The Yonkers Police Department instituted an investigation into the allegations made by Joseph against Antwan Byrd and brought Joseph to the Yonkers Police station to file a complaint. In furtherance of that investigation, Joseph was examined by a physician at Saint Joseph's Hospital in Yonkers.

On September 25, 1992, Petitioner was arrested by the Yonkers Police Department

on various charges of sodomy and sexual abuse as defined by N.Y. Penal Law §130.50(1) and §130.65(1) (McKinney's 1994). He was then detained pending his appearance in the Westchester County Family Court, State of New York.

On October 5, 1992, a probable cause hearing was held in the Family Court, at which the victim, Joseph, testified. At the close of testimony, the Family Court held that there existed "probable cause to believe that conduct, which would be a crime of sodomy, if committed by an adult, was committed, and Antwan [Petitioner] committed it." Accordingly, Petitioner was remanded to a secure facility pending the commencement of a fact-finding hearing scheduled for October 30, 1992.

Decision of the Family Court

On November 2, 1992, the fact-finding hearing commenced and testimony was taken from a number of witnesses including the victim, his mother and Petitioner. At the conclusion of the fact-finding hearing, the Family Court found, "beyond a reasonable doubt," that Petitioner "committed conduct which if committed by an adult would constitute the crimes of Sodomy in the First degree [two counts], [as defined by N.Y. Penal Law] §130.50, subdivision (1), by forcible compulsion ...." and two counts of Sexual Abuse in the first degree as defined by N.Y. Penal Law §130.65(1) (McKinney's 1994). After rendering its decision, a dispositional hearing was scheduled for December 17, 1992.

At this hearing, testimony was taken from the Probation Officer assigned to

investigate the dispositional alternatives in this case. Accordingly, the Family Court was presented with psychological and psychiatric evaluations conducted on Petitioner while he was detained at the youth facility. The Family Court was also presented with the dispositional recommendation of the Westchester County Department of Probation. That recommendation was for Petitioner to be "placed with the New York State Division for Youth."

The Family Court accepted the recommendation of the Department of Probation and the other experts who conducted evaluations in this case, and placed Petitioner with the New York State Division for Youth for a period of three (3) years pursuant to N.Y. Family Court Act §353.5 (McKinney's 1994).

Decision of the Supreme Court of the State of New York Appellate Division, Second Department

It is from the Order of Disposition that Petitioner appealed to the Supreme Court of the State of New York Appellate Division, Second Department. Matter of Antwan B., 198 A.D.2d 348 (2d Dep't. 1993) mot for leave to appeal denied, 83 N.Y.2d 755 (1994). On his appeal, Petitioner raised, inter alia, the issue of his right to a fair trial, including his allegation that the trial judge was biased against him based on his and his family's religious preferences.

Oral argument on the appeal was held on October 25, 1993. By Decision and Order dated November 15, 1993, the Appellate Division, Second Department, unanimously affirmed the Order of the Family Court, stating that the facts as presented were "legally sufficient to

establish the appellant's guilt of the acts charged beyond a reasonable doubt. Moreover, ... the finding of guilt was not against the weight of the evidence." (See Appendix C, p. 4a.)

In its decision, the Appellate Division, upon a meticulous review of the full record below, also considered all of Petitioner's claims of bias and discrimination, specifically his claim that the trial judge was biased against him and his family, and found them to be "without merit." (Id.)

Thereafter, Petitioner sought permission from the Appellate Division to appeal to the New York State Court of Appeals. On January 19, 1994, this motion was denied by the Appellate Division. (See Appendix D, p. 6a.)

Decision of the New York State Court of Appeals

After the Appellate Division of the Supreme Court, State of New York, denied Petitioner permission to appeal to the Court of Appeals, he sought permission directly from the New York State Court of Appeals. On May 3, 1994, the New York State Court of Appeals also denied Petitioner's motion for leave to appeal. (See Appendix B, p. 2a.)

SUMMARY OF ARGUMENT

This case is not of special importance as the decision of the Appellate Division of the Supreme Court of the State of New York, Second Department, conflicts with neither decisions of this Court nor with other Circuits.

The decision of the New York State Appellate Division, Second Department, at bar, was in complete accord with the rulings of this Court on this issue of an accused's right to Due Process and fair hearing as established by the Court in e.g. In Re Gault, 387 U.S. 1 (1967); Estes v. State of Texas, 381 U.S. 532 (1965), reh'g den, 382 U.S. 875 (1965); In Re Winship, 397 U.S. 358 (1970); Sheppard v. Maxwell, 384 U.S. 333 (1966); and Haley v. Ohio, 332 U.S. 596 (1948). As the lower Courts here ruled, and as

the record amply demonstrates, Petitioner has failed, as a matter of law, to establish that he was denied a fair trial or denied full protections afforded all those accused by the Due Process clause of the United States Constitution.

Petitioner was afforded a full and fair trial by the Courts of the State of New York at every level of review which fully protected all rights guaranteed Petitioner by the Constitution of the United States.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review

Notwithstanding his patent failure to present a scintilla of evidence to support his allegations, Petitioner bases his claim that he was deprived of a fair trial solely on statements of the Family Court Judge, most of which were made off-the-record, which he has taken completely out of their original context and given a twisted and distorted meaning. Not only has Petitioner mischaracterized the nature of these statements, he has disingenuously juxtaposed them out of their original time frames.

This Court, however, has never regarded its function as merely to

correct a perceived legal error by a disappointed litigant in a lower court decision.

Petitioner's claim that the trial court was biased against him is based totally on his perception of the facts surrounding his trial, a version of the facts found to be meritless by the reviewing Court, the New York State Appellate Division, Second Department. Since Petitioner's entire case is solely fact-specific, his baseless claims may be refuted with a recitation of what actually transpired at the trial.

Petitioner desperately seeks to distort the record below by alleging that the Family Court Judge made certain remarks revealing his purported bias against the Petitioner. These remarks, however, were taken completely out of context. For example, as the Family

Court Judge indicated, the statement regarding Petitioner going to school with the Judge's children was uttered during an off-the-record conversation at which counsel were discussing possible dispositional alternatives if Petitioner were to admit his guilt. Moreover, the discussions were initiated with a view toward settling the case.

Even though these discussions occurred prior to the conclusion of the fact-finding hearing, the conversation was purely hypothetical in nature in that the discussion was related to how Petitioner would receive counseling.

As the record indicates, the Family Court was concerned with how Petitioner would get help at the dispositional phase of the case if he continued to deny his involvement in the incident. The Court's statement was made in a hypothetical

context. Specifically, the parties were discussing possible dispositional alternatives, one of which was the release of Petitioner to the community in his grandmother's care. The Family Court Judge made the statement to emphasize that without receiving some form of therapy, he would not want Petitioner in school with his children. This feeling was especially warranted in light of all the prior testimony he had heard up to that point.

Prior to the off-the-record discussion, the Family Court had already heard testimony from the victim at the probable cause hearing and from the victim and his mother at the fact-finding hearing. The Family Court was, therefore entitled to lend some credence to what it had previously heard, and indicated to Petitioner's trial counsel that, up to that point, it believed some form of

therapy was needed for Petitioner. This did not indicate that the Family Court was predisposed to convict Petitioner or that it had already decided the case.

With respect to Petitioner's grandmother, the statement quoted by Petitioner on page 4-5 of his Petition for a Writ of Certiorari, is completely misleading as to when it was made, and therefore, so out of context, that it is rendered meaningless. Notwithstanding Petitioner's assertion, this statement was not made at the fact-finding hearing at which Petitioner was found to have committed the acts of Sodomy. It was made after a finding of guilt had been rendered, and during a fact-finding on a second unrelated charge of Sodomy.

Therefore, Petitioner's contention that he was denied a fair trial or that the Family Court was predisposed to

convict him is totally spurious and unfounded. There is no indication in the record that the Family Court was in any way biased against Petitioner, was closed-minded, or had a predetermined result.

In addition to misconstruing the Family Court's position, Petitioner blatantly tries to mislead this Court as he has unsuccessfully tried to mislead each Court in the New York State Court system at bar. In his petition for a Writ of Certiorari to this Court, Petitioner alleges he has been denied a fair trial due to the allegedly "prejudicial" and "discriminatory" remarks of the trial Court (see Petition, p. 9). In support of this contention, Petitioner cites statements made by the Family Court at his Dispositional Hearing concerning his

grandmother's presence at the hearing. At that point, the fact-finding phase of the proceedings was completed and Petitioner's involvement in acts of Sodomy and Sexual Abuse had already been established beyond a reasonable doubt. Therefore, statements alleged to be made at that dispositional phase of the case had no effect on the issue of determining Petitioner's guilt or innocence of the acts charged, since that question had already been decided.

B. There is no conflict between the New York State decisions below and the decisions of this Court

To the extent that Petitioner vainly attempts to present an issue to this Court regarding his claimed right to have his grandmother present during the dispositional phase of his case, this right is purely illusory and not based upon any

decision of either this Court or the Courts of New York. This Court has never held that a juvenile accused has the right to have anyone other than his or her parent or other legal custodian present at either a trial or a disposition of their case, and Petitioner has cited no case as authority for that spurious proposition. The grandmother, at bar, was not the legal custodian for the Petitioner. Therefore, Petitioner's grandmother had no right to be present at the dispositional hearing.

In fact, according to the N.Y. Family Court Act §341.2(3) (McKinney's 1994), at bar, only the accused's parent or other person responsible for his care has a statutory right to be present at all stages of the case. Therefore, excluding Petitioner's grandmother from the hearing in no way impaired Petitioner's constitu-

tional rights, given the fact that his mother, who is legal guardian, was present at all stages of the proceeding.

In conclusion, the record does not support Petitioner's contention that he has been denied the right to a fair and unbiased trial. The record and the evidence presented clearly demonstrate that the Family Court correctly held that Petitioner committed the acts alleged in the juvenile delinquency petition, and that his trial was both fair and unbiased. All of Petitioner's claims were fully addressed by appellate review in the State of New York and found to be without merit.

CONCLUSION

For the foregoing reasons, the petition for writ for certiorari should be denied.

Respectfully submitted,

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